Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SCOTT ARMSTRONG, *et al.*

Petitioners,

v.

EXECUTIVE OFFICE OF THE PRESIDENT, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the National Security Council (NSC) an "agency" under the Federal Records Act?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Scott Armstrong, the National Security Archive, the American Historical Association, the American Library Association, the Center for National Security Studies, and Eddie Becker. Petitioners were plaintiffs and appellees in the proceedings below.

Appellants-defendants in the proceedings below were the Executive Office of the President, the Office of Administration, the National Security Council, the White House Communications Agency, and the Acting Archivist of the United States, sued in her official capacity.

Prior to the judgment that petitioners ask this Court to review, former Senator Gaylord Nelson and Gary Stern were plaintiffs in the proceedings below, and former Presidents Ronald Reagan and George M. Bush were defendants. These parties were dismissed prior to the judgment that petitioners ask this Court to review.

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OPINIONS BELOW

The opinion of the District Court holding that the National Security Council is an "agency" is reported at 877 F. Supp. 690 (D.D.C. 1995) and is reprinted in the Appendix to this petition at pages A52-A86. This ruling was reversed by a divided panel of the Court of Appeals for the District of Columbia Circuit, in an opinion reported at 90 F.3d 553 (D.C. Cir. 1996), and reprinted in the Appendix at pages A1-A51.

JURISDICTION

The Court of Appeals denied petitioners' timely petition for rehearing and suggestion for rehearing *in banc* in an unreported order dated November 6, 1996. *See* Appendix A106-07. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The definitions section of the Federal Records Act, 44 U.S.C. 2901, as amended, provides:

> As used in this chapter, and chapters 21, 25, 31, and 33 of this title -
>
> * * * * *
>
> (13) the term "executive agency" shall have the meaning given such term by section 3(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472(a));
>
> (14) the term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Supreme Court, the Senate, the House of Representatives, and the Architect of the Capitol and

any activities under the direction of the Architect of the Capitol).

Section 3(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 472(a)), provides:

> (a) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

The Freedom of Information Act, 5 U.S.C. § 552(f), provides that:

> (f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

The definitions section of the Administrative Procedure Act, 5 U.S.C. § 551, provides:

> For the purpose of this subchapter -
>
> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States;
>
> (D) the government of the District of Columbia;

* * *

Sections 101 and 103 of the National Security Act of 1947, and selected executive orders and regulations concerning the National Security Council, are set forth in the Appendix beginning at A108.

STATEMENT OF THE CASE

This action concerns the application to the highest offices in the Executive Branch of the laws designed to prevent destruction of government records. In the statutes governing preservation and access to federal agency records, Congress has defined "agency" broadly to encompass "any executive department" or "other establishment" in the Executive Branch. 44 U.S.C. § 2901(13); 40 U.S.C. § 472(a); 5 U.S.C. § 552(f). The Executive Office of the President (EOP) is an agency subject to these laws, but a limited exception, based on legislative history, has been recognized for "'the President's immediate personal staff or units in the Executive Office [of the President] whose *sole function* is to advise and assist the President.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 1380, 93rd Cong., 2d Sess. 15 (1974)) (italics added).

In *Kissinger*, this Court concluded that the National Security Council (NSC) is not covered by this "sole function" exception, but is an agency subject to the Freedom of Information Act (FOIA). Indeed, from 1974 through 1993, it was universally acknowledged by Congress and within the Executive Branch that the NSC is an "agency" because it does not *solely* advise and assist the President, but exercises authority over a host of important national security issues, such as intelligence operations and emergency preparedness.

In March, 1994, however, in order to avoid judicial review of its records destruction practices, the NSC reversed its position and declared that it was not an "agency," and, therefore, not subject to the Federal Records Act, the statute regulating destruction of agency records. The district court rejected the NSC's claim, but a divided panel of the District of Columbia Circuit reversed and held that the NSC is entirely exempt from the Federal Records Act and the FOIA.

The majority relied on *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), in which a divided panel held that the determination of whether an EOP entity falls within the "sole function" exception requires application of a three-factor test that did not appear in the legislative history or in any prior court decision. Judge Tatel dissented because he believed that the majority's interpretation of *Meyer* "strayed from Congress's commands," Appendix at A42-43, and would exempt EOP units "engaging in just the sort of official activity that the Federal Records Act and FOIA were designed to bring into public view." *Id.* at A29-31.

A. *Statutory Background*

The EOP encompasses a number of Executive Branch entities that report directly to the President and share common administrative services. *See* 5 U.S.C. App., Reorganization Plan No. 1 of 1939, 53 Stat. 1423. The units within the EOP include the White House Office, the Office of Management and Budget, the Office of the United States Trade Representative, the Office of Science and Technology Policy, and the NSC. *See* 3 C.F.R. § 100.735-2(a) (1995); United States Government Manual 1996/97 at 90-107.

In *Kissinger*, this Court recognized that the EOP is an "agency" subject to the laws governing preservation of, and access to, records of federal agencies. 445 U.S. at 156. The Federal Records Act, which governs preservation of agency records, defines "agency" as "any executive department or independent establishment in the executive branch of the Government." 44 U.S.C. § 2901(13); 40 U.S.C. § 472(a). The FOIA was amended by Congress in 1974 to define agency as "any executive department . . . or other establishment in the executive branch of the Government (including the Executive Office of the President)." 5 U.S.C. § 552(f).

However, in *Kissinger*, based on legislative history, this Court endorsed a limited exception to the specific statutory inclusion of the Executive Office of the President. 445 U.S. at 156. The exemption arises from the Conference Report for the 1974 FOIA Amendments, which states that:

> With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

H.R. Conf. Rep. No. 1380, 93rd Cong., 2d Sess. 15 (1974). In 1978, Congress endorsed *Soucie* once again as the appropriate test for determining which EOP units are "agencies" when it adopted the Presidential Records Act (PRA) to govern preservation and access to records that are not subject to the Federal Records Act or FOIA. *See* H.R. Rep. No. 1487, 95th Cong., 2d Sess. 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5742; *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1295 (D.C.

Cir. 1993) ("[t]he legislative history of the PRA could not be clearer in indicating congressional intent to adopt the test articulated in *Soucie* to determine what entities are 'agencies' subject to the FOIA"). Accordingly, the FRA and FOIA govern the records of "agencies," and the PRA governs records of entities that are not subject to those statutes because they fall within the exemption recognized in *Kissinger* for records of the President's immediate personal staff or units in the EOP whose sole function is to advise and assist the President. *See* 44 U.S.C. § 2201(2); *Armstrong v. EOP*, 1 F.3d at 1292.

The issue of whether an entity is an "agency" subject to the FRA and FOIA, or subject only to the PRA, is critical for several reasons. ***First***, although both the FRA and the PRA mandate the preservation of records, the remedies available to prevent improper destruction have been held to be significantly greater under the FRA. In 1991, the District of Columbia Circuit ruled that, although agency compliance with the FRA is subject to judicial review and enforcement, compliance with the PRA during the President's term of office is not subject to judicial review. *Armstrong v. Bush*, 924 F.2d 282, 290-91 (D.C. Cir. 1991).

Second, the Archivist has a duty to take action to prevent the improper removal or destruction of agency records under the FRA, *id.* at 295-96, but the Archivist has no ability or duty to take action against improper destruction of Presidential records by EOP entities subject to the PRA. *Armstrong v. EOP*, 1 F.3d at 1291 ("[n]either the Archivist nor an agency head can initiate any action . . . to effect the recovery or ensure the preservation of presidential records."); Appendix at A4.

Finally, records subject to the PRA are not subject to disclosure under FOIA during the President's term of office, but only become available for release under the

FOIA approximately five to twelve years after the President leaves office. *See* 44 U.S.C. § 2204(c)(1); *Armstrong v. EOP*, 1 F.3d at 1291; *American Historical Ass'n v. Peterson*, 876 F. Supp. 1300, 1308 (D.D.C. 1995).

From the amendment of FOIA in 1974 through 1993, it was uniformly acknowledged that the NSC was an "agency" subject to the FOIA. When Congress adopted the *Soucie* test in 1974, it plainly considered the NSC to be an "agency." The report of the House committee that drafted the 1974 amendment to the definition of "agency" in the FOIA states that the Committee intended that the amended include "such functional entities as ... the National Security Council." H.R. Rep. No. 876, 93d Cong., 2d Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6274. This Court cited this House Report as "indicating that the National Security Council is an executive agency to which the FOIA applies." *Kissinger*, 445 U.S. at 156. During the hearings leading up to the 1978 PRA, Congress obtained an opinion from congressional researchers concluding that the NSC is an agency.[1]

The Executive Branch also agreed that the NSC is an agency under *Soucie*. After the 1974 amendments to the FOIA, the NSC issued regulations as an agency under the FOIA and the Privacy Act. *See* 40 Fed. Reg. 7316 (1975); 40 Fed. Reg. 47746 (1975). Under FOIA's requirement that "each agency" submit an annual report to

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[1] *See* Appendix at A43 (quoting LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, APPLICABILITY OF THE FREEDOM OF INFORMATION ACT TO THE EXECUTIVE OFFICE OF THE PRESIDENT 8 (1978), *reprinted in Hearings on H.R. 10998 and Related Bills Before a Subcomm. of the House Comm. on Gov't Operations*, 95th Cong., 2d Sess. 759, 766 (1978)).

Congress on its FOIA activities, 5 U.S.C. § 552(e), the NSC submitted reports each year describing thousands of FOIA determinations made by the NSC staff. Shortly before President Carter signed the PRA, the Office of Legal Counsel advised the President that the NSC is an agency under the Administrative Procedure Act (APA) and the FOIA. 2 Op. Off. Legal Counsel 197, 205 (1978), *withdrawn,* Memorandum from Walter Dellinger, Acting Assistant Att'y Gen., Office of Legal Counsel, to Alan J. Kreczko, Special Assistant to the President and Legal Advisor, Nat'l Sec. Council (Sept. 20, 1993).

In litigation, the courts, including this Court in *Kissinger*, considered the NSC an agency under *Soucie*, and the government never disputed that NSC decisions were subject to judicial review under the APA and the FOIA. *See Kissinger*, 445 U.S. at 146, 156-57 (circuit court and this Court state that the NSC is an agency subject to FOIA); *Armstrong v. EOP*, 1 F.3d at 1296 ("NSC appears to have routinely conceded its status as an 'agency' subject to the FOIA.").

The NSC concluded that it was an agency because, in its own words, it serves a "dual role" in which it both advises and assists the President and performs "independent functions set forth in the governing statute, as well as in regulations and Executive Orders." Appendix at A22; *see also id.* at A96 (May 8, 1993 Memorandum to NSC Staff; "the NSC both advises and assists the President and is an agency."). This dual role was reflected in the NSC's practice of maintaining separate files for "presidential" records and federal records. The NSC instructed staff to classify records as federal records if they were "'received or created in connection with the work of the statutorily-created [NSC],'" and as presidential records if created for the President and his advisors "'independent of any meeting or policy and staff

actions of the NSC or its various groups.'" *See Armstrong v. EOP*, 1 F.3d at 1291, 1296 (quoting EOP regulations); *see also* Appendix at A98 & n.1 (instructions on separating presidential and federal records at NSC).

Moreover, until March 1994, the NSC and the Archivist treated records concerning the NSC's interagency processes as agency records subject to the Federal Records Act. Under the FRA, an "agency" must submit schedules describing the disposition of its records, and it must transfer historically valuable agency records to the Archivist when they are no longer needed by the agency. 44 U.S.C. §§ 2107, 3303. NSC records dating back to the Truman and Eisenhower administrations were transferred to the Archivist as agency records under the Federal Records Act. As recently as 1990, the NSC submitted records schedules to the Archivist for transfer of Reagan and Bush administration records as "agency" records subject to the FRA. *See* 36 C.F.R. § 1228.26-30 (1996).

B. *Proceedings Below.*

This action was brought by historians, researchers, journalists and librarians to prevent the destruction of historically valuable records created by the NSC and other EOP components on their electronic mail systems. *See Armstrong v. EOP*, 1 F.3d at 1280. At the close of the Reagan Administration in January 1989, the NSC and EOP were planning to erase the information stored on their electronic mail systems, despite the historical importance of these records to an understanding of the Iran-Contra Affair and other activities of the Reagan Administration. *Id.* at 1283 n.7 (discussing substantive importance of the records). At plaintiffs' request, the district court entered a temporary restraining order

prohibiting destruction of these records, and the government subsequently agreed to preserve computer tapes containing the records in dispute. *Armstrong v. Bush*, 721 F. Supp. 343, 347-48 & n.9 (D.D.C. 1989). In November 1992, a second temporary restraining order was entered to prevent destruction of similar records created during the Bush Administration by the EOP and the NSC. *See Armstrong v. Bush*, 807 F.Supp. 816, 820-23 (D.D.C. 1992). The government has acknowledged that, but for the district court's intervention, many of the electronic records on the NSC and EOP systems would not have been retained.

In two separate interlocutory appeals, the District of Columbia Circuit Court held that (1) judicial review is available to determine whether the records preservation guidelines of the EOP and NSC comply with the FRA, but not the PRA, *Armstrong v. Bush*, 924 F.2d at 291-97; (2) the EOP's and the NSC's recordkeeping guidelines violated the FRA, *Armstrong v. EOP*, 1 F.3d at 1282-88; and (3) agency guidelines for distinguishing federal and presidential records are subject to judicial review to ensure that the agency is not evading its obligations under the FRA. *Id.* at 1292-94. This third ruling was necessary because both the NSC and the Office of Science and Technology Policy (OSTP) had issued guidelines that classified some of their records as "presidential," and the case was remanded to allow the district court to determine whether these guidelines were consistent with *Soucie*. *Id.* at 1296-97. Throughout these proceedings during the first five years of this litigation, the NSC conceded that it was an "agency."[2]

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[2] Indeed, in 1992, in response to Requests for Admissions under Fed. R. Civ. P. 36, the NSC characterized some of its functions as "agency" functions and asserted that it was subject to both the FRA

On remand, the NSC did not defend its guidelines classifying some records as presidential and others as federal, but declared, for the first time in this or any other litigation, that it is not an agency.[3] At the NSC's urging, the Office of Legal Counsel withdrew its 1978 opinion that the NSC is an "agency," and, on March 24, 1994, the NSC announced that, because it was not an agency, it no longer considered itself subject to the records preservation requirements of the FRA or the disclosure requirements of the FOIA. Appendix at A91.

The district court rejected the NSC's novel claim as "contrary to history, past practice and the law," and directed the NSC and the Archivist to issue recordkeeping guidelines "to ensure that non-Presidential records are preserved under the FRA and are not destroyed under the guise of the Presidential Records Act." *Id.* at A57, A85. Based on an extensive stipulated record, the district court found that the NSC was an agency under *Soucie* because it performs traditional agency functions, including rulemaking and adjudication. *Id.* at A72-76. By statute, the NSC is responsible for directing the Central Intelligence Agency ("CIA"), *id.* at A74, and the President has issued various executive orders and presidential directives delegating specific authority over intelligence activities, protection of classified national security information, telecommunications, emergency preparedness, nonproliferation of nuclear weapons, and public diplomacy to the NSC. *Id.* at A74-76. The district court also found that the fact that "the NSC has admitted to being, and has operated as, an agency prior to" its change of position in

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and the FOIA. Appendix at A63 n.9.

[3] OSTP abandoned its prior guidelines and acknowledged that all of its records were subject to the FRA.

this litigation, reinforced the conclusion that it is an agency. *Id.* at A82-83.

On appeal, a divided panel of the Court of Appeals reversed. The majority did not address this Court's conclusion in *Kissinger* that the NSC was an agency. It dismissed the NSC's prior descriptions of its dual functions and the NSC's prior, repeated acknowledgements that it was an agency as "not probative on the question" of whether the NSC is indeed an agency. *Id.* at A22-23. The majority also dismissed the legislative history indicating that Congress concluded that the NSC was an agency on the ground that, by adopting the judicially-created test announced in *Soucie*, Congress "handed the matter back to the courts, anticipating that we would continue to shape and refine the basic *Soucie* definition." *Id.* at A24-25. The original *Soucie* definition, according to the majority, was re-shaped by the D.C. Circuit in *Meyer v. Bush*, when a divided panel ruled that whether an entity is an agency depended on three factors: "(1) 'how close operationally the group is to the President,' (2) 'whether it has a self-contained structure,' and (3) 'the nature of its delegat[ed]' authority." *Id.* at A8 (quoting *Meyer*, 981 F.2d at 1293). This formulation of the test does not appear in *Soucie*, the legislative history or any decisions prior to *Meyer*. 981 F.2d at 1312 (Wald, J., dissenting) (criticizing first two factors as "entirely creatures of the majority's own making").

Applying the *Meyer* factors to the NSC, the majority agreed with the district court that the NSC had a sufficiently self-contained structure to be an agency. The NSC has a separate budget and more than 150 professional employees, "organized into a complex system of committees and working groups reporting ultimately to the Executive Secretary" of the NSC, and "separate offices, each responsible for a particular geographic region

or functional area, with clearly established lines of authority both among and within offices." Appendix at A11. The majority also agreed that the NSC staff has authority to review requests for document declassification and apparent authority to decide appeals on classification issues. It also acknowledged that the President has delegated oversight and coordination functions to the NSC in a number of areas, including emergency telecommunications, nuclear non-proliferation and public diplomacy. *Id.* at A21.

However, the majority concluded that these functions and delegations were not sufficient under *Meyer* because the President's role as chairman of the NSC is an "overwhelming fact." *Id.* Although the NSC has a separate legal and structural identity, the majority believed that this was "not sufficient to overweigh the significance of the close proximity — indeed the essential identity — between the statutory Council and the President." *Id.*

The majority also insisted that the NSC cannot be deemed an agency unless it is shown that the authority delegated to the NSC was exercised "without direct supervision by the President." *Id.* Thus, although the NSC has authority over emergency telecommunications functions that can bind even non-governmental telecommunications common carriers and users, the majority found this authority to be irrelevant because there was no proof that it could be exercised "without the consent of the President or his [National Security Advisor.]" *Id.* at A17.

Judge Tatel dissented, saying that he feared that the majority had allowed the sole function exception under the federal records laws to swallow the rule. *Id.* at A29. According to Judge Tatel, the "'sole function' exception excludes only a small subset of entities within the Executive Office of the President that do not themselves

'do' anything apart from advising the President and assisting him in what he does." *Id.* at A30. However, under the majority's approach it appeared that no EOP unit could be an agency. *Id.* at A36, A41.

The majority's overwhelming emphasis on the NSC's proximity to the President was misplaced, Judge Tatel argued, because the "less proximate NSC staff and numerous NSC interagency groups" exercised independent functions. *Id.* at A28. Moreover, "[e]ven with the President as a member, the NSC is a legal entity distinct from the President, and the record indicates that responsibilities delegated to the NSC are in fact carried out without the personal involvement of the President." *Id.* The majority's insistence on proof that the NSC "may act without the consent of the President" was also misplaced. The record showed that the NSC has "the authority to act without first seeking the President's consent." *Id.* at A36. The majority's suggestion that such authority is not sufficient and that agency status requires proof that an entity is able to "exercise its authority even over the objection of the President," creates an "impossible hurdle" that no EOP unit could satisfy. *Id.* at A35-36; *see also id.* at A29-31.

Finally, Judge Tatel observed that, because the only basis for exempting the NSC from the federal records laws "is a limited exception derived from the legislative history of FOIA," the court should be careful not to stray from Congress' command when applying *Meyer*. *Id.* at A42. The historical record showed that "the framers of the Federal Records Act, FOIA, and the Presidential Records Act would be quite surprised to learn from the court's opinion that the Federal Records Act does not

cover and FOIA does not guarantee citizens access to nonsensitive NSC documents." *Id.*[4]

Petitioners' timely application for *en banc* review was denied on November 6, 1996.

SUMMARY OF REASONS FOR GRANTING THE WRIT

After decades in which Congress, this Court, and even the NSC itself recognized that the NSC was an agency, the Circuit Court for the District of Columbia has ruled to the contrary in an unprecedented decision that exempts the NSC from the federal records preservation and disclosure laws. Both the legal interpretation underlying this ruling, and its specific effect on the NSC, present important issues of federal law that warrant review by this Court.

1. In *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980), this Court recognized that the Executive Office of the President is an "agency" under the federal records statutes but allowed a limited exemption for EOP units whose sole function is to advise and assist the President. The District of Columbia Circuit's rulings in the decision below and in *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), have not been faithful to *Kissinger*, but have expanded and distorted the

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[4] In fact, members of Congress have subsequently criticized the decision below as contrary to Congress' intent and the historical understanding of the statutes. *See* 142 Cong. Rec. H10451 (Sept. 17, 1996) (Rep. Maloney) (D.C. Circuit's decision is "contrary to 20 years of freedom of information practice and contrary to the way Congress has treated the National Security Council in other legislation"); *Id.* at S10716 (Sen. Leahy) (D.C. Circuit ruled that the NSC is not an agency "despite the fact that the NSC has complied with FOIA for years under both Republican and Democratic Presidents.")

limited "sole function" exception in a manner that is contrary to Congress' express mandate that the agencies covered by the FOIA include "the Executive Office of the President." 5 U.S.C. § 552(f). The conflict between the limited exception that this Court endorsed in *Kissinger* and the decision below presents an important issue of federal law that should be settled by this Court.

The Circuit Court's departure from the test endorsed in *Kissinger* is demonstrated by the fact that this Court considered the NSC to be an agency in that case, and both Congress and the Executive Branch concurred that the NSC was an agency because of the substantial authority it wields. The Circuit Court's new approach also cannot be reconciled with the result in *Soucie v. David*, the decision on which this limited exception is founded. Moreover, the ruling below not only removes the NSC from the federal records laws, but calls into question the status of other EOP units that have always been considered agencies under the federal records statutes.

2. The Circuit Court's specific holding that the NSC is not an agency also should be reviewed by this Court because of its profound effect on the management of vital government records held by the NSC. Because of the NSC's role in formulating and implementing critical national security decisions, the NSC creates and holds an enormous volume of historically important records. The importance of the NSC's records, and the risk of improper destruction, are evident from the documents at issue in this case, many of which provided critical evidence concerning the Iran-Contra Affair. However, under the Circuit Court's rulings, the NSC's records preservation practices are immune from judicial review, and the remedies provided for unlawful destruction and removal of agency records do not apply to the NSC. The Circuit Court's decision to exempt the NSC from the federal

records preservation and disclosure laws creates a significant gap in the statutes preserving historically important government records and should not be permitted to stand without review by this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, BY EXPANDING THE LIMITED EXCEPTION TO THE DEFINITION OF AGENCY RECOGNIZED IN THIS COURT'S DECISION IN *KISSINGER*, DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD REVIEW.

Dissenting in *Meyer v. Bush*, Judge Wald warned that the majority's revision of the "sole function" test in that case "clearly maps out the formula for getting around disclosure laws in the Executive Office of the President." 981 F.2d at 1315. The extension of *Meyer* in the decision below goes even further by reshaping the law so that the limited exemption recognized by this Court in *Kissinger* extends to even the most firmly established and powerful EOP units, such as the NSC. This result is incompatible with the statutory mandate that the EOP be considered an agency, fundamentally alters the standard that Congress adopted, and creates a gaping loophole in the records laws.

The statutory definitions of agency in the FRA and FOIA are cast in broad terms to cover "any executive department," and there is no exception for units of the EOP. 44 U.S.C. § 2901(13); 40 U.S.C. § 472(a). Indeed, the FOIA explicitly identifies the Executive Office of the President as an agency. 5 U.S.C. § 552(f). The exception recognized by this Court in *Kissinger* for units "whose sole function is to advise and assist the President," is very

limited, and is based only on the legislative history indicating that Congress adopted the result in *Soucie*. H.R. Conf. Rep. No. 1380, *supra*, page 5, at 15.

When Congress enacts legislation that adopts a judicial interpretation in this manner, the courts are bound to apply it, and may not alter or reshape it. *See United States v. Board of Commissioners*, 435 U.S. 110, 134-35 (1978). The District of Columbia Circuit's recent decisions on the definition of "agency," however, have violated this principle by fundamentally altering the test that Congress endorsed. Specifically, the Circuit's decision in *Meyer* and the ruling below impose two requirements that are simply incompatible with the *Kissinger* standard, and potentially exempt any EOP unit from the records laws.

First, the majority insisted that an EOP entity is an agency only if it has the authority to act contrary to the President's wishes. Executive orders, presidential directives, and regulations all delegate authority to the NSC, its committees or its staff to act in specific areas without further action by the President.[5] Nonetheless, the ruling below holds that such authority is not sufficient unless it is exercised "without direct supervision by the President," or "without the consent of the President." Appendix at A17, A21. The NSC, however, is no different from other EOP entities and agencies exercising delegated authority from the President. Every EOP unit and Cabinet Department is subject to the President's

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[5] *See, e.g.*, Appendix at A116-31, Exec. Order No. 12,472, §§ 2(a)(1), 2(c)(4) (1984); Exec. Order No. 12,656, §§ 101(a), 104 (1988); Exec. Ord. 12,829 §§ 102(a), (b) (1993); Exec. Order No. 12,919, § 104(a) (1995); 32 C.F.R. § 2101.41 (1996); 32 C.F.R. § 2003.20(k) (1996); 47 C.F.R. § 201.4(a) (1995); 47 C.F.R. § 211.6(g) (1995); 47 C.F.R. §§ 213.0(b), 213.7(f),(g) (1995).

direction and cannot act "independently" from the President in the sense that they have no authority to disregard the President's policies. Under the majority's approach, "virtually no loyal government body would be sufficiently 'independent' to qualify as an agency. Only renegades or freelancers who ignored or disregarded the President's orders would be seen to 'act independently.'" *Meyer*, 981 F.2d at 1309 (Wald, J., dissenting).

Second, the ruling below gives overwhelming weight to the proximity of an EOP unit to the President. See Appendix at A11-12, A21. All EOP units have proximity to the President, but such proximity only indicates that application of the "sole function" test is necessary. The ruling below, however, allows the proximity of EOP units to the President to overshadow the question of whether a particular EOP unit has authority to do more than "advise and assist" the President. "[B]y the majority's broad definition of 'proximity,' virtually every person or entity within the Executive Office of the President would be excluded from the FOIA, contrary to the statute's express inclusion of the Executive Office of the President in its definition of agency." *Meyer*, 981 F.2d at 1310 (Wald, J., dissenting).

The significance of these two additional criteria, and the conflict between the Circuit Court's test and *Kissinger*, is evident from three considerations.

To begin with, from 1974 to 1993, the NSC was universally regarded as an agency under the test endorsed in *Kissinger*. The legislative history leaves no doubt that the Congress that enacted the amendments to the FOIA in 1974, and enacted the PRA in 1978, concluded that the NSC was an agency under the sole function test. *See* Appendix at A43. Moreover, on the eve of the enactment of the PRA, the Office of Legal Counsel issued a detailed analysis concluding that the NSC is an "agency" under

Soucie. 2 Op. Off. Legal Counsel 197, 205 (1978). When the applicability of the FOIA to the NSC was presented to this Court in *Kissinger*, this Court was able to assume that the NSC was agency because its status under the sole function test was never questioned by the NSC or anyone else in the Executive Branch. The NSC has not changed in any material way since *Kissinger* was decided in 1980, but the ruling below has changed the standard for identifying agencies within the EOP.

The Circuit Court's departure from the standard that Congress adopted is also evident from the contrast between *Soucie* — the decision that Congress specifically endorsed — and the ruling below. In *Soucie*, the plaintiff sought a report on the supersonic transport prepared at the President's request by the Office of Science and Technology ("OST"), but OST argued that it was staff to the President, not an "agency" under the Administrative Procedure Act ("APA"). 448 F.2d at 1070-71. Like the NSC, OST was part of the EOP, and it was headed by the President's personal advisor on scientific matters. *Id.* at 1074 & n.22. OST was created by a presidential reorganization plan to (1) advise and assist the President in achieving coordinated federal policies for the promotion of basic research and education in the sciences, and (2) "'to evaluate scientific research programs undertaken by agencies of the Federal government." Reorganization Plan No. 2 of 1962, Pt. I, § 3, 76 Stat. 1253 (1962). The Court, nonetheless, held that OST's authority to evaluate research programs made the OST an agency because, despite its proximity to the President, its authority went beyond advising and assisting the President. 448 F.2d at 1075. If OST's minimal authority was sufficient to make the OST an agency, the NSC's functions, which dwarf OST's functions in scope, magnitude and gravity, are certainly sufficient to make the NSC an agency under the

standard that Congress endorsed. *See* Appendix at A39, A41 (Tatel, J., dissenting) (NSC authority over nonproliferation and public diplomacy is indistinguishable from that of OST over research programs).

Finally, *Meyer* and the decision below represent a sharp break from the pre-*Meyer* decisions applying *Soucie*. These decisions held that an EOP unit is an agency if its mandate included the authority to "issue guidelines to federal agencies," "coordinate federal programs," oversee "activities of federal agencies," *Pacific Legal Foundation v. Council of Environmental Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980) (Council on Environmental Quality is an agency), or provide information to Congress, *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978) (Office of Management Budget is an agency); *accord Energy Research v. Defense Nuclear Facilities*, 917 F.2d 581, 584-85 (D.C. Cir. 1990). Although the NSC and its subgroups have the same type of authority over the protection of classified information, telecommunications, emergency preparedness planning, and public diplomacy, the ruling below holds that the NSC is not an agency under *Meyer*'s interpretation of *Soucie*. *See* Appendix at A18, A20 (NSC's authority to oversee and evaluate are not sufficient to make it an agency).[6]

The majority's conclusion that the NSC is not sufficiently distinct from the President to be an agency is

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[6] The only decision prior to *Meyer* holding that an EOP unit was not an "agency" is *Rushforth v. Council of Economic Advisors*, 762 F. 2d 1038 (D.C. Cir. 1985), in which the court concluded that the Council of Economic Advisors was not an agency. The court found that the Council was not an agency because the President had not given the Council authority to issue regulations, or to coordinate or oversee federal programs, *id.* at 1041-43 — the very type of authority that has been delegated to the NSC.

particularly striking because of the NSC's separate legal identity and size. The NSC is not the creation of a presidential executive order or reorganization plan, but was established by Congress in the National Security Act of 1947. 50 U.S.C. § 402(a). The statute not only establishes the NSC, but controls, in substantial part, its structure and organization. *Id.* § 402(c), (g). The NSC's committees and working groups report to its Executive Secretary, a position established by the statute. Appendix at A11. The NSC has an intricate hierarchical system of twenty-five working groups that report to more senior committees. *Id.* at A69, A72. The NSC's procedures are designed so that presidential participation is required only if the committees and staff are unable to resolve issues within their delegated authority. *See, e.g.*, 49 Fed. Reg. 20780 § 5.a (1984); Appendix at A73-74, A78 (NSC adjudicates in many areas such as declassification, export licensing and FOIA requests, without the participation of the President). This committee system also insulates most of the 150 staff in the NSC bureaucracy from direct interaction with the President.

Indeed, in 1978, the Office of Legal Counsel specifically rejected the current claim that, because the President is a member of the NSC, "in all cases the [NSC's] action must be viewed as Presidential action," 2 Op. Off. Leg. Counsel at 203. The law refutes this contention, the Legal Counsel concluded, because the NSC "was created by Congress as an entity distinct from the Presidency," and "the independent authority which it possesses, it possesses as the National Security Council." *Id.* at 204. Moreover, much of the NSC's authority is exercised through subordinate committees "which are empowered by executive order to perform important, substantive and far-reaching governmental functions . . . without Presidential participation." *Id.* These observations

and the Office of Legal Counsel's conclusion that "the NSC is a body having functions, power, and authority of its own and is not simply an *alter ego* of the President," are no less true today. *Id.* (italics in original).[7]

In concluding that the NSC is, nevertheless, not an agency, the ruling below casts doubt on the status of other EOP units that Congress has considered, and the Executive Branch has acknowledged, are agencies under the "sole function" test. 55 Fed. Reg. 46037 (1990) (Office of Administration, Office of Science and Technology Policy, Office of United States Trade Representative, and Office of National Drug Control Policy are agencies). Other EOP units have "proximity" to the President and are headed by the President or Presidential advisors. *See, e.g.*, Reorganization Plan No. 1 of 1977, 42 Fed. Reg. 56101, 91 Stat. 1633, § 2 (1977) (Office of Administration headed by the President). All EOP units, like the NSC, answer to the President and must exercise their authority in accordance with his executive orders and directives. The ruling below's suggestion that these characteristics may "overwhelm" the substantial governmental authority exercised by these EOP units creates uncertainty concerning the application of the federal records laws within the EOP.

Congress clearly intended that EOP entities be required to manage and preserve their records in accordance with the Federal Records Act, and that they be

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[7] The Office of Legal Counsel's September, 1993 opinion withdrawing this 1978 opinion does not reject this analysis of the NSC's separate legal identity, but, instead, concludes that NSC functions discussed in the Opinion were not sufficient to make the NSC an agency. However, in 1993 the Office of Legal Counsel did not evaluate most of the NSC functions that the district court concluded make the NSC an agency.

subject to disclosure to the extent provided in the Freedom of Information Act. The decision below represents a fundamental departure from the test adopted by Congress and endorsed by this Court in *Kissinger*, and should be reviewed by this Court.

Moreover, because of the District of Columbia Circuit's unique authority over the EOP, this Court should review this ruling even though there is no inter-circuit conflict. The units of the EOP are located solely within the District of Columbia Circuit. Consequently, with respect to records preservation issues, the District of Columbia Circuit is likely to be the only court with jurisdiction to provide an effective remedy for improper management of EOP records. Indeed, it is doubtful that any court outside the District of Columbia Circuit could have enjoined the destruction of NSC and EOP records, as occurred in this case. With respect to FOIA, although litigation outside the District is possible, it appears unlikely that a conflict will emerge from other courts because the District of Columbia Circuit has been the exclusive authority on the application of *Soucie* to the EOP. Apart from this Court's decision in *Kissinger*, we have been unable to identify *any* published opinion of a court outside the District of Columbia Circuit addressing whether any unit of the EOP is an agency. In the past, this Court, recognizing the District of Columbia Circuit's preeminent role in administrative law, has reviewed the Circuit's important decisions on FOIA issues despite the absence of a conflict. *See, e.g., Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989); *Kissinger*, 445 U.S. at 146. The Court should do the same here.

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S RULING IN *KISSINGER* AND EXEMPTS VITAL HISTORICAL RECORDS OF THE NSC FROM THE FEDERAL RECORDS LAWS.

The Circuit Court ruled that the NSC is exempt from the Federal Records Act and the FOIA without even mentioning this Court's conclusion in *Kissinger* that "the National Security Council is an executive agency to which the FOIA applies." 445 U.S. at 156. The Circuit Court's silent rejection of this aspect of *Kissinger* is of exceptional importance because of the enormous volume of significant and historically important documents that the NSC generates and holds. The NSC acts as the "highest Executive Branch entity that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence and special activities, and attendant policies and programs." Exec. Order No. 12,333, § 1.2(a), *reprinted in* Appendix at A112. The NSC, its staff, and its subgroups play comparable roles as the highest tribunal for government policy on national security planning, emergency preparedness, and similar issues.[8] Accordingly, the records of the NSC represent a critical chronicle of both the development of national security policy and the implementation of those policies within the government.[9]

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[8] *See* Appendix at A114-26, Exec. Order 12,472, § 2(a), (c)(4) (emergency telecommunications functions); Exec. Order 12,656, § 104(a) (emergency preparedness); Exec. Order 12,829, § 102(a) (industrial security program); Exec. Order 12,919 § 104(a), (c) (defense industrial resources preparedness).

[9] During the period that the NSC acknowledged that it was an agency, NARA consistently treated the NSC's substantive records as

The records actually preserved as a result of this case underscore this point. The injunctions entered against the NSC during this litigation secured the preservation of (i) records used by the Tower Commission, congressional investigators and the Independent Counsel looking into the Iran-Contra Affair; (ii) records used by the Department of Justice in connection with its prosecution of Manuel Noriega; and (iii) records used by the NSC in connection with the confirmation of Robert Gates as Director of the Central Intelligence Agency. *See Armstrong v. EOP*, 1 F.3d at 1283 n.7. The improper destruction of such records is a clear and present danger to the preservation of the history of our government. The destruction and falsification of NSC records in an effort to cover-up the Iran-Contra Affair is well-documented.[10] Moreover, the NSC itself would have destroyed most of these records but for the injunctions entered in this case. The ruling below, however, gives a green light to such improper destruction of NSC records.

First, the ruling below makes the NSC entirely exempt from any obligation to preserve its records in accordance with the Federal Records Act. Under the District of Columbia Circuit's construction of the law, the unlawful destruction of NSC records, whether the papers are in paper or electronic form, is immune from judicial review. Furthermore, because the NSC is not an agency under the

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worthy of permanent retention because of the NSC's central role in shaping national security policy. *See* 44 U.S.C. § 2107 (authorizing Archivist to take custody of historically important records for preservation).

[10] Report of the Congressional Committees Investigating the Iran-Contra Affair, H. Rep. No. 433, S. Rep. No. 216, 100th Cong., 1st Sess, 306-07 (1987); *United States v. North*, 716 F. Supp. 644, 647 (D.D.C. 1989).

ruling below, the NSC's management of records is not subject to oversight by the Archivist, and the NSC is not required to comply with the Archivist's regulations on records management.

Moreover, if agency records are improperly removed, the Federal Records Act provides that the Archivist may initiate legal action to retrieve them. *See* 44 U.S.C. §§ 2905, 3106; *Kissinger*, 445 U.S. at 148; *Armstrong v. Bush*, 924 F.2d at 294. However, under the ruling below, NSC records are not subject to this provision, and the Archivist is powerless to recover improperly removed NSC records. *See Armstrong v. EOP*, 1 F.3d at 1291 (citing *Armstrong v. Bush*, 924 F.2d at 290).

The ruling below also exempts the NSC from the Freedom of Information Act, so that the NSC is under absolutely no obligation to disclose its records. Over the past twenty years, the NSC has processed thousands of FOIA requests as an agency under the FOIA. Sensitive NSC records containing national security secrets, or intra-governmental deliberations have, of course, been protected from disclosure by FOIA's exemptions protecting these materials. *See* 5 U.S.C. § 552(b)(1), (5); *see also* Appendix at A48-49, A84-85; 2 Op. Off. Legal Counsel at 205 n.15 (discussing exemptions available to the NSC). Nonetheless, the requirement that nonsensitive NSC records be disclosed under the FOIA has played an important role in providing the public with information on the NSC's role, and in exposing controversial or improper activities.

Thus, the practical effect of the Circuit Court's rejection of *Kissinger*'s statement that the NSC is an agency provides further reason for this Court to grant review. The ruling exempts the NSC from the records preservation and disclosure laws after decades in which Congress, this Court, and even the NSC, regarded the

NSC as an agency subject to these laws. The NSC's broad authority rivals or exceeds that of any "agency," and immunizing the NSC's records from the federal records laws represents a significant change in the application of these laws that should not be permitted to stand without further review.

CONCLUSION

This Court should grant the petition to review the District of Columbia Circuit Court's ruling that the NSC is not an agency.

Respectfully submitted,

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